In denying absolute immunity for these two other categories of retaliatory conduct, the panel properly looked to established Supreme Court precedent rejecting absolute immunity for administrative and investigative functions, which includes termination, demotion and treatment of employees, advising police officers during the investigative phase of a criminal case, performing acts that are generally considered police functions, acting prior to having probable cause to arrest, and making statements to the public concerning criminal proceedings [Pet'r App. 8a-9a (citing *inter alia Forrester*, 484 U.S. at 228-30, *Burns*, 500 U.S. at 498 and *Buckley*, 509 U.S. at 274-78)]. Just as with Gammick and Helzer's decision to not prosecute Botello's cases, their retaliatory motivation did not influence the panel's analysis.

The Supreme Court has time and again found that, when a prosecutor performs administrative functions of an employer, it is "neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other." *See, e.g., Buckley*, 509 U.S. at 273 (citation omitted). Thus, because Botello's employer, the school district police chief, would have been protected by only qualified immunity for his employment decisions, the panel properly found absolute immunity was not justified when the prosecutors "stepped into the [employer's] shoes" and dictated who he should hire and how he should staff and conduct his investigations [Pet'r App. 12a].[2] Because the appellate panel's

2. Amicus Sparks further argues that Gammick and Helzer could not be found to have engaged in an administrative function because they were not "lawfully entrusted" with the power to make employment decisions affecting Botello and lacked "functional authority" over his employment.

Sparks's argument is meritless, first, because it was never raised before the lower courts, and, second, because it wholly disregards

(Cont'd)

decision is in strict accordance with the Supreme Court's well-established functional approach, certiorari is not warranted.

II.

THE APPELLATE PANEL PROPERLY APPLIED THE WELL-ESTABLISHED FUNCTIONAL APPROACH BY FOCUSING ON THE PROSECUTORS' CONDUCT AND ITS TIES TO THE JUDICIAL PROCESS

In their second argument, petitioners contend that the appellate panel improperly applied a "result oriented approach" that is "antagonistic to the function analysis" [Pet'r Br. 9]. This too is sheer nonsense. The panel did

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(Cont'd)
factual allegations in the first amended complaint as well as case precedent supporting liability for interference with employment opportunities. *See, e.g., O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 722, 116 S. Ct. 2353, 135 L. Ed. 2d 874 (1996) ("The fact of interference [First Amendment rights] is not altered by the circumstance that the victims are not classified as employees.") (independent contractors); *Harris v. Harvey*, 605 F.2d 330, 335 (7th Cir. 1979) (finding judge lacked absolute immunity for racially motivated interference in employment relationship with another employer); *AMAE v. State of California*, 231 F.3d 572, 580 (9th Cir. 2000) (finding "indirect" employers liable in Title VII context if they interfere in employment opportunities with another employer); *Sibley Memorial Hospital v. Wilson*, 488 F.2d 1338, 1340-41 (D.C. Cir. 1973); *Hyland v. Wonder*, 117 F.3d 405, 411-12 (9th Cir. 1997). Although Gammick and Helzer were not Botello's employers, they are alleged to have misused their power and influence to interfere with his employer's decisions on how to staff and conduct its investigations. Accordingly, they may be held liable for their conduct in interfering with Botello's employment.

nothing of the sort. To pursue their argument, petitioners misrepresent its holding. They assert that the panel "held that the decision to refuse cases investigated by Botello was not intimately tied to the judicial process. . . ." [Pet'r Br. 9].

In truth, the panel held exactly the opposite. As previously discussed, the panel found that the prosecutors' decision to refuse cases investigated by Botello *was* intimately tied to the judicial process and therefore *was* protected by absolute immunity [Pet'r App. 10a-11a]. It is not the decision to refuse Botello's cases but rather the prosecutors' *other* conduct that the panel found was insufficiently connected to the judicial process: their defaming of Botello outside the context of any prosecution and their direct interference in all stages and aspects of the investigative process long before prosecutions were even contemplated.

With no regard for the truth, petitioners further misrepresent allegations in the first amended complaint by making assertions such as: "Gammick and Helzer did not directly participate in a purely investigative activity. They merely made the decision not to accept cases investigated in whole or in part by Botello. . . ." [Pet'r Br. 11].

As previously discussed, these assertions by petitioners are entirely false. What Botello alleges is that Gammick and Helzer demanded that Botello's employer not permit him to be involved in any aspect of any investigation that might at some later time lead to formal prosecution. Refusing to provide a reason to Botello's employer for their unprecedented demand, this had the practical effect of preventing Botello's employer from using him as an investigator—one of the roles he was hired to perform. To

underscore their heavy-handed approach, Gammick and Helzer insisted that if Botello were to participate in any aspect of any investigation, even well before a formal prosecution was contemplated and no matter what his role, any case that ensued would be dismissed and the alleged wrongdoer released [FAC, ER 90-91]. Such conduct by the prosecutors cannot be framed as other than "direct participation in purely investigative activity." It cannot fall within the zone of prosecutorial discretion because it bears no relation to the judicial phase of the criminal process or any pending case.

Petitioners further argue that, once the decision to not prosecute any of Botello's cases was made, that decision had the effect of precluding Botello from performing his job requirements. As earlier they urged the appellate panel, petitioners again urge this Court to overlook their unprotected conduct—their administrative and investigative functions—and pretend it doesn't exist on grounds that Botello may also have been harmed by their protected conduct, the non-prosecution decision. They call this harm or injury to Botello "the effect" of their non-prosecution decision. They assert that the panel was improperly swayed by the fact that their decision to refuse Botello's cases may have had the effect of injuring Botello.

However, Botello maintains that he could have performed many investigative and administrative functions in connection with preliminary work-ups of cases had Gammick and Helzer not insisted that his employer remove him from *all* phases and *all* aspects of *all* investigations. More importantly, petitioners have it backwards. They are the ones focusing on effect and not conduct. The panel specifically stated, "We express no opinion as to whether the prosecutors' actions damaged Botello." [Pet'r App. 10a,

n. 6]. Effect is irrelevant to a functional analysis. The only question to consider is whether the prosecutors had absolute immunity to take the actions they took. Effect is a damages issue that is wholly separate from the question of absolute immunity, and the panel ignored it, rightfully so.

Flatly rejecting petitioners' specious approach to the function analysis, the panel strictly followed this Court's approach in *Buckley*, where it was made clear that the focus of a functional analysis must be on the conduct of the prosecutors and not the harm caused by that conduct. *Buckley*, 509 U.S. at 271. Correctly disregarding the injuries, damages, and "effect" caused by the prosecutors' various conduct, the panel properly focused on the prosecutors' acts and the question as to which of those acts were intimately tied to the judicial process or more appropriately characterized as an administrative or investigative function. For this reason, petitioners' baseless second argument is also unworthy of certiorari.

III.

THE PANEL PROPERLY LOOKED TO STATE LAW TO FIND THAT A NEVADA DISTRICT ATTORNEY ACTS AS A COUNTY POLICYMAKER WHEN MAKING ADMINISTRATIVE AS WELL AS PROSECUTORIAL DECISIONS

Petitioners do not dispute that Gammick, the Washoe County District Attorney, has final policymaking authority, or that he ratified the conduct of his deputy Helzer. Nor have they offered any argument to rebut the proposition that a district attorney acting in his administrative and investigative capacity is a county policymaker [*See* Pet'r App. 15a].

Because petitioners have been consistently silent on the question, the county is potentially liable for Gammick and Helzer's conduct falling within the administrative and investigative functions.

As to the separate question addressing Gammick's decision not to prosecute Botello's cases—conduct found to be within the prosecutorial function—the appellate panel properly looked to state law in arriving at its conclusion that he acted as a policymaker for the county in that decision as well. Under Nevada law, as interpreted by the Ninth Circuit Court of Appeals, "principal district attorneys are final policymakers for the municipality with respect to the conduct of criminal prosecutions." *Webb v. Sloan*, 330 F.3d 1158, 1165 (9th Cir. 2003), *cert. denied*, *Carson City v. Webb*, 540 U.S. 1141, 124 S. Ct. 1042, 157 L. Ed. 2d 952 (2004). Petitioners contend that, in *Webb*, the question whether prosecutors were policymakers for the county rather than for the state was "simply assumed" by the court and the parties without analysis [Pet'r Br. 13]. That is not true.

To the contrary, when determining whether deputy district attorneys were policymakers for their local governments in *Webb*, the Ninth Circuit was required to make a preliminary finding that district attorneys (to whom the deputy district attorneys report) were policymakers for their respective localities. *See Webb*, 330 F.3d at 1165-66. In determining that Nevada district attorneys have final policymaking authority for their local governments in making prosecution decisions, the appellate court in *Webb* noted that the office of the district attorney is not created by the Nevada constitution but rather was statutorily created by the legislature, which in turn prescribed its duties. *Id.* at 1164 (citing *Lane v. Second Judicial Dist. Court*, 760 P.2d 1245, 1251 (Nev. 1988); Nev. Rev. Stat. § 252.110

[Pet'r App. 25a-26a]). It further noted that, in Nevada, "the matter of the prosecution of any criminal case is within the *entire control* of the district attorney" with no supervision or oversight by the state attorney general. *Id.* (citing *Cairns v. Sheriff, Clark County*, 89 Nev. 113, 508 P.2d 1015, 1017 (Nev. 1973) (per curiam)) (emphasis in *Webb*). Based on these and other considerations, the court found the county prosecutor to be a county policymaker when making prosecutorial decisions.

The Supreme Court "defer[s] considerably" to the expertise of the federal courts of appeals when interpreting the laws of states under their jurisdiction. *McMillian v. Monroe County, Alabama*, 520 U.S. 781, 786, 117 S. Ct. 1734, 138 L. Ed. 2d 1 (1997). The matter of the county district attorney's policymaking authority in Nevada has been well settled since the Ninth Circuit issued its decision in *Webb*. There is no reason to disturb it.

While Nevada recently changed its law to provide that deputy district attorneys are no longer "policymakers," the law as to district attorneys remains unchanged. *See* Assembly Bill (AB) 477, Section 6 [Pet'r App. 27a]. Thus Gammick's conduct as a duly elected county district attorney and policymaker continues to bind Washoe County. Had the state legislature seen fit to change the law as to district attorneys —which it did for deputy district attorneys following *Webb*— it could easily have done so. However, the state legislature left undisturbed that portion of the *Webb* decision finding district attorneys to be county prosecutors when engaged in prosecutorial decision-making. This Court too should leave the issue undisturbed.

IV.

PETITIONERS' ALLEGATION OF A "CHILLING EFFECT" OF THE PANEL'S DECISION IS EQUALLY MERITLESS

Petitioners allege that, absent a grant of certiorari, prosecutors throughout the country "will now be chilled out of concern over the effects of the exercise of [prosecutorial] judgments" [Pet'r Br. 12]. Nothing could be further from the truth. The scope of prosecutorial immunity is so well settled that the Supreme Court has not seen fit to revisit the question since deciding *Kalina* in 1997. *See Kalina v. Fletcher*, 522 U.S. 118, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997). Petitioners present no facts indicating that the administration of justice is harmed by the appellate panel's decision. Further they present no facts indicating how they may be remotely chilled within the judicial process. Before the panel issued its decision in the instant case, prosecutors in general knew they were protected only by qualified immunity when they engaged in administrative and investigative functions. The panel's decision did nothing to disturb well-established immunities for prosecutors.

Finally, there is no division in the circuits on these questions, *see Roe*, 109 F.3d at 583 (according with sister circuits regarding non-prosecution decisions) and there is no chilling effect because nothing the panel decided will in any way impede, hinder or conflict with any lawful prosecutions or interfere in any way with the district attorneys' office to prosecute cases free of liability concerns. *See Buckley*, 509 U.S at 270, n.4 (citing *Imbler*, 424 U.S. at 424-25).

Note that the Amicus Curiae brief of City of Sparks supporting the Petition says nothing about any chilling effect. Had there been a chilling effect, the City of Sparks surely would have mentioned it.

CONCLUSION

For reasons stated, respondent Botello asks this Court roundly to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

TERRI KEYSER-COOPER
LAW OFFICE OF
TERRI KEYSER-COOPER
100 N. Arlington Ave., #10F
Reno, NV 89501
(775) 337-0323

DIANE K. VAILLANCOURT
Counsel of Record
LAW OFFICE OF
DIANE K. VAILLANCOURT
849 Almar Ave., Ste. C403
Santa Cruz, CA 95060
(831) 458-3440

Attorneys for Respondent

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No. 05-583

IN THE

Supreme Court of the United States

RICHARD GAMMICK, JOHN HELZER
and WASHOE COUNTY,

Petitioners,

v.

RENE BOTELLO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE CITY OF SPARKS AS AMICUS CURIAE SUPPORTING PETITION FOR WRIT OF CERTIORARI

CHESTER H. ADAMS
Sparks City Attorney
431 Prater Way
Sparks, Nevada 89431
(775) 353-2324

Attorney for Amicus Curiae

198214

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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STATEMENT OF INTEREST OF AMICUS CURIAE

Under Supreme Court Rule 37.4, amicus curiae City of Sparks submits its brief in support of the petition for a writ of certiorari[1].

This case involves an issue of prosecutorial immunity. The amicus City of Sparks is within the jurisdiction of the Ninth Circuit and is therefore subject to that court's decision in this case. The Ninth Circuit's decision could have pervasive negative implications for local prosecutors and this Court should consider the amicus City's viewpoint.

INTRODUCTION

At issue is the Ninth Circuit Court of Appeals' erosion of the legal pillars erected by this Honorable Court which have heretofore supported the functions and purposes of prosecutorial immunity. The Ninth Circuit Court of Appeals ignored the legal guideposts illuminated by prior precedent and chose instead to embark upon a less traveled route seen only through the dim light of subjectivity.

The Court should grant review of the Ninth Circuit Court of Appeals' decision because it is deeply flawed and at odds with prior precedent.

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1. Pursuant to Supreme Court Rule 37.6 amicus states that no counsel for another party authored any part of this brief, and no person or entity other than amicus City of Sparks made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE CASE

The instant matter evolves from the District Court's granting of the Petitioner's Rule 12(b)(6) dismissal. App. B[2]. The Ninth Circuit Court of Appeals affirmed in part and reversed in part the District Court's Order. App. A. In reversing the District Court, the Ninth Circuit Court of Appeals concluded that the Washoe County District Attorney (Gammick) along with his Deputy District Attorney (Helzer) were not entitled to prosecutorial immunity. Specifically, the Ninth Circuit Court of Appeals concluded that prosecutorial immunity was precluded because Gammick and Helzer engaged in administrative acts.

The Respondent, Rene Botello was previously employed by the Washoe County Sheriff's Office (WCSO) in the County of Washoe, State of Nevada as a Child Sexual Assault Investigator. Botello speaks both English and Spanish and is often called upon to testify as a witness in sexual assault cases involving Spanish speaking victims and suspects. App. A.[3]

Despite his lack of medical training, Botello alleged that "in the course of his duties" he learned that a CARES nurse[4],

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2. Citations to the Decision of the District Court as well as the Decision of the Ninth Circuit Court of Appeals are to the Appendix to the Petition for a Writ of Certiorari.

3. Botello makes no allegations that he has any medical training or specialized medical knowledge.

4. The Child Abuse Response and Evaluation program (CARES) is a state program administered by the Washoe County District Attorney's Office. App. A n.2.

Lily Clarkson, was wrong in her diagnosis of a female child who, in nurse Clarkson's opinion, had been sexually abused[5].

After Botello determined that nurse Clarkson was wrong in her diagnosis, he "reluctantly concluded" that it would be wrong for him to remain silent. App. A. Botello concluded that he needed to bring evidence of nurse Clarkson's "wrongful medical findings" to the attention of the appropriate officials[6]. After informing public officials of his concerns over nurse Clarkson's findings, Botello then requested an audit of the CARES program "to ensure the integrity of County sexual assault investigations and prosecutions". App. A.[7]

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5. There is no allegation that as part of his investigative duties with the WCSO, Botello was responsible for ensuring that medical diagnoses were correct. Furthermore, Botello did not allege that his investigative duties required him to monitor the performance of professionally trained CARES nurses who conduct medical examinations on minor females who have been sexually assaulted.

6. Botello's "conclusion" that it would be wrong for him to remain silent is apparently based upon his own subjective beliefs. There is no allegation that Botello's job responsibilities required him to investigate and thereafter submit such "evidence" to "appropriate officials". Furthermore, Botello's "conclusion" that he should be the one to bring these "concerns" to a public official appears superficial given the fact that three different pediatricians "had already concluded that nurse Clarkson's findings were unsupported". App. A.

7. There have been no findings or allegations that Botello's "investigative duties" with the WCSO included overseeing the CARES program. Furthermore, there are no allegations that Botello had either the legal authority or duty to "ensure the integrity of Washoe County's sexual assault investigations and prosecutions".

Botello's independent investigation and subsequent disclosures allegedly angered Gammick and Helzer who allegedly warned Botello to "keep his mouth shut" about nurse Clarkson's erroneous medical testimony. The District Attorney allegedly threatened to retaliate if Botello continued to advocate for outside oversight of the CARES program". App. A.

Botello nevertheless continued in his efforts in reporting his concerns about the CARES program. Botello went so far as to report a "possible coverup and retaliation by the DA's office" to both the Nevada Attorney General's Office and the Federal Bureau of Investigation. App. A.[8]

Botello ultimately resigned his position with the WCSO and applied for employment with the Washoe County School District Police Department. App. A.[9]

The Ninth Circuit Court of Appeals found that "Botello experienced immediate retaliation"[10] from Gammick and

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8. Once again Botello's concerns appear personal and not job related.

9. Botello does not allege that the Washoe County District Attorney either forced Botello to resign from the WCSO or was responsible for Botello's resignation.

10. For purposes of civil rights liability, the Ninth Circuit's finding of retaliation is clear error absent allegations that the District Attorney was an employer, co-worker, co-conspirator or former employer. This is amplified by the lack of allegations concerning an adverse employment action and a causal connection thereto. *Haddle v. Garrison*, 525 U.S. 121, 125, 119 S. Ct. 489, 492, 142 L. Ed. 2d

(Cont'd)

Helzer. The Ninth Circuit Court of Appeals found that Gammick and Helzer attempted, but nevertheless failed in their efforts to prevent Botello from being hired by the Washoe County School District Police Department. The Ninth Circuit Court of Appeals also found that the District Attorney and his Deputy District Attorney "attempted through follow-up communications" to have Botello fired from the Washoe County School District Police Department. App. A.[11]

THE NINTH CIRCUIT MISAPPLIED THE LAW OF PROSECUTORIAL IMMUNITY

While recognizing that the functional analysis test was appropriate in matters involving a determination of prosecutorial immunity, the Ninth Circuit misapplied the holding of *Forrester v. White*, 484 U.S. 219, 228-30, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988).

Forrester, *supra* at 484 U.S. 221 concerned the denial of absolute judicial immunity for the performance of an administrative act, namely, the demotion and discharge of a probation officer.

(Cont'd)

502 (1998); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 339, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997); *Kratzer v. Rockwell Collins, Inc.*, 398 F.3d 1040, 1048 (8th Cir. 2005); *Williams v. Motorola, Inc.*, 303 F.3d 1284, 1291 (11th Cir. 2002); *Ford v. Gen. Motors Co.*, 305 F.3d 545, 552-53 (6th Cir. 2002).

11. In addition to the Ninth Circuit's finding that Botello was not fired from the Washoe County School District Police Department, there is no allegation that any alleged "follow-up communications" initiated by either Gammick or Helzer resulted in Botello's termination.

The functional approach applied in *Forrester* involved an examination of, ". . . the nature of the functions with which a particular official has been lawfully entrusted with."[12]

The state court judge in *Forrester*, *supra*, had been "lawfully entrusted" with ". . . the authority to hire adult probation officers, who were removable in his discretion"[13] as well as vested with "the authority to appoint juvenile probation officers to serve at his pleasure"[14]. Therefore, when the judge exercised his lawful authority by demoting or discharging a subordinate employee, the judge lost his immunity because he assumed an administrative role of an employer making an employment decision:

> . . . a judge who hires or fires a probation officer cannot meaningfully be distinguished from a district attorney who hires and fires assistant district attorneys, or indeed from any other Executive Branch official who is responsible for making such employment decisions.

Forrester, *supra*, 484 U.S. at 229, 108 S. Ct. at 545.

The Ninth Circuit did not perform the required analysis associated with the functional approach articulated in *Forrester*, *supra*. Specifically, the Ninth Circuit failed to

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12. *Forrester*, *supra*, 484 219, 224, 108 S. Ct. 542.

13. The supervisory relationship of a judge over a probation officer has been deemed to be "essential to the decision-making process" *Blackwell v. Cook*, 570 F. Supp. 474, 478 (N.D. Indiana 1983).

14. *Forrester*, *supra*, 484 U.S. at 541.

examine the nature of the functions the Washoe County District Attorney/assistant attorney had been "lawfully entrusted" with in relation to Botello's employment. Unlike *Forrester*, *supra*, 484 U.S. at 229, 108 S. Ct at 545, the Ninth Circuit made absolutely no finding that the Washoe County District Attorney made any employment decision or otherwise caused Botello's discharge or demotion[15].

Furthermore, the Ninth Circuit made absolutely no finding that either the Washoe County District Attorney or his assistant were responsible for supervising or overseeing Botello's employment activities[16]. Such a finding is impossible because the acts of Botello while employed with the WCSO involving the CARES program and nurse Clarkson were far beyond the scope of Botello's job responsibilities. Unlike *Forrester*, *supra*, Botello made absolutely no allegation that the acts of Gammick or Helzer either caused the loss of his job or any other constitutionally protected interest.

The fact that there are no allegations suggesting that either Gammick or Helzer negatively impacted the Respondent's employment removes Gammick and Helzer's alleged actions from the specter of administrative decision-

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15. In order to state an actionable claim alleging the loss of a constitutionally protected property right or interest, Botello must allege that Gammick or Helzer's action adversely affected his employment. Botello has made no such claim, mere assertions of damage to personal reputation are insufficient to state a claim under Section 1983, *Paul v. Davis*, 424 U.S. 693, 701, 96 S. Ct. 1155, 1161, 47 L. Ed. 2d 405 (1976); *Renaud v. Wyoming Dep't. of Family Services*, 203 F.3d 723, 726-27 (10th Cir. 2000).

16. *Forrester*, *supra*, 484 U.S. at 229, 108 S. Ct. at 545.

making involving an employment matter. Succinctly put, neither Gammick nor Helzer were "lawfully entrusted" with the power to make an employment decision concerning Botello. Absent this ability, neither Gammick nor Helzer have the functional authority to perform an administrative act contrary to Botello's employment interests. The functional analysis test as articulated in *Forrester*, *supra*, militates toward a finding of prosecutorial immunity under the facts of this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CHESTER H. ADAMS
Sparks City Attorney
431 Prater Way
Sparks, Nevada 89431
(775) 353-2324

Attorney for Amicus Curiae